

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Education Committee

BILL: SB 1082

SPONSOR: Senator Miller

SUBJECT: H. Lee Moffitt Center/Public Records Exemption

DATE: February 24, 2005

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Matthews</u>	<u>O'Farrell</u>	<u>ED</u>	Favorable
2.	_____	_____	<u>HE</u>	_____
3.	_____	_____	<u>GO</u>	_____
4.	_____	_____	<u>RC</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill revises the definition of “trade secrets” for purposes of the public records exemption for proprietary confidential business information owned or controlled by the not-for-profit corporation operating the H. Lee Moffitt Cancer Center and Research Institute and its subsidiaries to include:

- Information relating to methods of manufacture or production;
- Potential trade secrets;
- Potentially patentable materials;
- Proprietary information received, generated, ascertained, or discovered during the course of research conducted by the not-for-profit corporation or its subsidiaries; and
- Proprietary and confidential information relating to business transactions resulting from the research.

In addition, the bill expands the public records exemption to exempt from public disclosure any information received by the not-for-profit corporation or its subsidiaries from a person in Florida or in another state or nation or the federal government which is otherwise exempt or confidential pursuant to the laws of Florida or another state or nation or pursuant to federal law.

This bill substantially amends section 1004.43, Florida Statutes, and creates two undesignated sections of law.

II. Present Situation:

Public Records Law

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1909. In 1992, Floridians adopted an amendment to the state constitution that raised the statutory right of access to public records to a constitutional level. Article I, s. 24(a), of the State Constitution provides that:

Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

The Public Records Law¹ also specifies conditions under which the public must have access to governmental records. Section 119.011(11), F.S., defines the term “public record” to include:

all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of the official business by any agency.

The Florida Supreme Court has interpreted this definition of public records to include all materials made or received by an agency in connection with official business which are used “to perpetuate, communicate, or formalize knowledge.”² Unless the Legislature makes these materials exempt, they are open for public inspection, regardless of whether they are in final form.³

Under Article I, s. 24(c), of the State Constitution, the Legislature may provide for the exemption of records from the open government requirements provided: (1) the law creating the exemption states with specificity the public necessity justifying the exemption; and (2) the exemption is no broader than necessary to accomplish the stated purpose of the law.

Public records law also recognizes a distinction between records that are made exempt and records that are made confidential. If a record is made exempt only, an agency is not prohibited from disclosing the document in all circumstances.⁴ If the Legislature makes certain information confidential and exempt, however, such information may not be released to anyone other than to the persons or entities designated in statute.⁵

¹ Chapter 119, F.S.

² *Shevin v. Byron, Harless, Schaffer, Reid, and Assocs., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

³ *See Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979).

⁴ *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA), *rev. denied*, 589 So. 2d 289 (Fla. 1991).

⁵ *See Inf. Op. to Chiaro*, January 24, 1997.

Open Government Sunset Review Act

The Open Government Sunset Review Act of 1995, s. 119.15, F.S., establishes a review and repeal process for public records exemptions. In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2, unless the Legislature reenacts the exemption. An “exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment narrows the scope of the exemption.”⁶

Under s. 119.15(2), F.S., an exemption may be maintained only if: “(a) The exempted record or meeting is of a sensitive, personal nature concerning individuals; (b) The exemption is necessary for the effective and efficient administration of a governmental program; or (c) The exemption affects confidential information concerning an entity.”

Section 119.15(4)(a), F.S., requires, as part of the review process, the consideration of the following questions:

1. What specific records or meetings are affected by the exemption?
2. Whom does the exemption uniquely affect, as opposed to the general public?
3. What is the identifiable public purpose or goal of the exemption?
4. Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

An exemption may be maintained only if it serves an identifiable public purpose, and it may be no broader than necessary to meet that purpose. An identifiable public purpose is served if the exemption meets one of the following purposes and the Legislature finds that the purpose is sufficiently compelling to override the strong policy of open government and cannot be accomplished without the exemption:

- The exemption allows “the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.”
- The exemption protects “information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals.” However, only information that would identify the individual is exempted.
- The exemption protects “information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.”

⁶ Section 119.15(3)(b), F.S.

The H. Lee Moffitt Cancer Center and Research Institute

Section 1004.43, F.S., establishes the H. Lee Moffitt Cancer Center and Research Institute at the University of South Florida. A board of directors manages the not-for-profit corporation that governs the Moffitt Center. The not-for-profit corporation may create, with prior approval from the State Board of Education, for-profit⁷ or not-for-profit subsidiaries. The records of the not-for-profit corporation and its subsidiaries are public records unless made confidential or exempt by law.

Section 1004.43, F.S., provides a public records and public meetings exemption for proprietary confidential business information and for meetings of the board of directors, in which the expenditure of appropriated dollars is not discussed. Proprietary confidential business information is defined as information the disclosure of which would harm the entities and relates to the following:

- Internal auditing controls;
- Matters protected by attorney-client privilege;
- Contracts for managed-care arrangements, including documents relating to the negotiation, performance and implementation of the contracts;
- Bids or other contractual data, banking records, and credit agreements;
- Private contractual data;
- Personnel information;
- Credentialing information;
- Minutes of meetings except for those meetings where the expenditure of appropriated dollars is discussed;
- Plans for marketing services;
- Trade secrets as defined in s. 688.002, F.S., including reimbursement methodologies or rates; or
- Identities of donors or prospective donors who wish to remain anonymous.

Divisions of Sponsored Research

Section 1004.22, F.S., authorizes a state university to create a division of sponsored research. As part of a public corporation of the state, the records of the division of sponsored research are subject to public disclosure unless specifically exempted by law. Section 1004.22(2), F.S., specifically exempts the following records from public disclosure: materials that relate to methods of manufacture or production; potential trade secrets; potentially patentable material; actual trade secrets; business transactions; or proprietary information received, generated, ascertained, or discovered during the course of research conducted within the state universities.

The Moffitt Center has opined that the records protected under the not-for-profit corporation's public records exemption would include the records protected from public disclosure requirements under the division of sponsored research's exemption. The University of South Florida believes that the exemption from public disclosure requirements under the division of

⁷ Section 4, ch. 2004-2, L.O.F., authorizes the Moffitt Center to create for-profit subsidiaries.

sponsored research is broader than the Moffitt Center's exemption. The university believes that its public records exemption extends to cover research agreements with a third party and that the Moffitt Center's exemption is more concerned with the business operations of the center. The university maintains that the expansion of the public records exemption is needed to ensure that any exempted information transmitted from the division of sponsored research maintains its protected status when delivered to the Moffitt Center. Accordingly, the University of South Florida has expressed its reservation about exchanging certain research information with the Moffitt Center.

III. Effect of Proposed Changes:

The bill revises the definition of "trade secrets" for purposes of the public records exemption for proprietary confidential business information owned or controlled by the not-for-profit corporation operating the H. Lee Moffitt Cancer Center and Research Institute and its subsidiaries. "Trade secrets" is redefined to mean trade secrets as defined in s. 688.002, F.S., including information relating to methods of manufacture or production, potential trade secrets, potentially patentable materials, or proprietary information received, generated, ascertained, or discovered during the course of research conducted by the not-for-profit corporation or its subsidiaries, including reimbursement methodologies or rates. In addition, trade secrets would include any proprietary and confidential information relating to business transactions resulting from such research.

This public records clarification would potentially resolve the dispute concerning protection of intellectual property between the Moffitt Center and the University of South Florida by specifying the Moffitt Center's public records exemption to include those items protected from disclosure in a division of sponsored research under s. 1004.22(2), F.S.

The public records exemption for proprietary confidential business information owned or controlled by the not-for-profit corporation operating the H. Lee Moffitt Cancer Center and Research Institute and its subsidiaries is substantially amended to include any information received by the not-for-profit corporation or its subsidiaries from a person in Florida or in another state or nation or the federal government which is otherwise exempt or confidential pursuant to the laws of Florida or another state or nation or pursuant to federal law.

Pursuant to the Open Government Sunset Review Act of 1995, the public records exemption as expanded by the bill to include additional information is scheduled to be repealed on October 2, 2010, unless reviewed and saved from repeal by reenactment by the Legislature. The bill provides a public necessity statement for the revised exemption. The bill provides that the Legislature finds that it is a public necessity that trade secrets of the H. Lee Moffitt Cancer Center or its subsidiaries as defined in s. 688.002, F.S., be confidential and exempt from public disclosure. In accordance with that definition, a "trade secret" consists of information that derives economic value, actual or potential, from not being readily ascertainable by others and that is the subject of reasonable efforts to maintain its secrecy. The bill provides that the Legislature finds that the redefinition of "trade secrets" in the bill does not substantially amend the existing exemption. In any event, the bill provides that the Legislature has determined that the disclosure of such information would adversely affect the H. Lee Moffitt Cancer Center and

Research Institute and its subsidiaries and would create an unfair competitive advantage for a person receiving such information.

Legislative findings are expressed in the bill that information received by the not-for-profit corporation or its subsidiaries from a person in Florida or another state or nation or the federal government which is otherwise exempt or confidential pursuant to laws of Florida or another state or nation or pursuant to federal law should remain confidential because the highly confidential nature of cancer-related research necessitates that the not-for-profit corporation or its subsidiaries be authorized to maintain the status of exempt or confidential information it receives from the sponsors of research. Without the exemptions provided in the bill, the disclosure of exempt and confidential information would place the not-for-profit corporation on an unequal footing in the marketplace as compared with competitors in the private sector who are not required to make such disclosures. The bill provides that the Legislature finds that the disclosure of such exempt and confidential information would adversely impact the not-for-profit corporation or its subsidiaries in fulfilling their mission of cancer treatment, research, and education.

The bill provides an effective date upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The bill substantially amends an existing public records exemption and is, therefore, subject to the two-thirds vote requirement of Article I, s. 24 of the State Constitution.

Article I, s. 24(c) of the State Constitution, authorizes the Legislature to enact general laws creating exemptions provided such laws state with specificity the public necessity justifying the exemption and that such laws are no broader than necessary to accomplish the stated purpose.⁸ On page 3, lines 26 and 27, the bill exempts “proprietary and confidential information relating to business transactions resulting from such research.” This could be determined to be overbroad under the cases interpreting Article I, s. 24 of the State Constitution, if this exemption is used to exempt all components of a business transaction and not just those parts for which a shield is necessary. The statement of public necessity does not explain the public necessity supporting the exemption of all business transactions. Given the types of information that are already protected under other provisions of the exemption, any proprietary and confidential information within documents related to such business transactions would already be required to be redacted. As such, this portion of the exemption could be subject to challenge.

⁸ *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999).

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Research entities may be more likely to share research information with the Moffitt Center if the information is protected from public disclosure. Accordingly, these research entities may benefit from the shared knowledge between the entities. The fiscal benefit to the private sector entity is indeterminate.

C. Government Sector Impact:

Research entities may be more likely to share research information with the Moffitt Center if the information is protected from public disclosure. Accordingly, the Moffitt Center may benefit from the shared knowledge between the entities. The fiscal benefit to the state is indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
